IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD R. HULL Plaintiff	:	CIVIL ACTION
v.	:	
CAROL DOTTER, MARTIN DRAGOVICH, MARVA CERULLO, and JEROME FRYZEL Defendants	:	NO. 96-3087

MEMORANDUM

Yohn, J. June , 1997

Plaintiff Donald R. Hull, an inmate at the State Correctional Institution at Mahanoy (SCI Mahanoy), alleges that in March, 1996, while housed in the Restricted Housing Unit (RHU), a toxic smell entered his cell over a period of a week causing him to experience headaches, stomach cramps, and minor nasal bleeding. On April 19, 1996, Hull filed a pro se civil rights complaint against various employees of SCI Mahanoy. Hull alleges that his Eighth Amendment right to be free from cruel and unusual punishment was violated when defendants Martin Dragovich, Carol Dotter and Jerome Fryzel permitted Hull to be housed in a cell in which poor air quality caused Hull serious physical harm. In addition, Hull claims that defendants Marva Cerullo and Dotter violated his constitutional rights by their inaction and deliberate indifference to his medical needs.

Defendants have moved for summary judgment on the grounds that Hull's injuries were not objectively sufficiently serious to constitute a violation of the Eighth Amendment, and

that Hull has failed to adduce any evidence to show that defendants were subjectively aware of Hull's deficient conditions of confinement and medical treatment. More recently, Hull has moved for leave to amend his complaint to include similar claims against additional defendants. For the reasons that follow, defendants' motion will be granted, and Hull's motion to amend the complaint will be denied.

I. BACKGROUND

The following is an account of the facts construed in the light most favorable to the non-moving party, the plaintiff.

Hull, who is currently serving a sentence for aggravated assault, moved to SCI Mahanoy in August, 1995. On March 5, 1996, prison authorities found Hull guilty of misconduct for unauthorized use of the mail, and sentenced Hull to thirty days solitary confinement in the RHU. Two days into his punitive confinement, a cloudy, toxic odor emanated from a vent positioned to the right and above Hull's cell door. The next day, Hull awoke with a headache and stomach cramps, and to discover four or five little globs of blood that had been discharged from his nose.

Over the next week, the noxious odors continued to seep into Hull's cell. On March 8, 1996, Hull informed unit nurse Kowaluh of the smell and his ailments, and Kowaluh gave Hull some aspirin. On March 10, 1996, Hull spoke with the commander of the guards in Hull's area, Captain Williams. Hull informed Williams

of the situation, and Williams told Hull to submit a request for a cell move. Later, Hull also complained to the night shift commander, Captain Biggs. Hull contends that Biggs witnessed that the cell was cloudy, but refused to move Hull because of the lateness of the hour. The next day, March 11, Hull submitted a written request for a cell move to defendant Fryzel, the Lieutenant for the RHU and, the following day, Fryzel replied to Hull's request, stating that no other cell was available.

On March 12, 1996, Hull forwarded a complaint to defendant Cerullo, a health care administrator at SCI Mahanoy. Cerullo replied that there was nothing she could do as the issue was a security and not a health matter. Also on March 12, Hull filed an official inmate grievance with defendant Dotter, the Grievance Coordinator.

On March 14, 1996, Hull further complained, this time to defendant Dragovich, the superintendent at SCI Mahanoy, who took no action in regard to Hull's complaint.

On March 15, 1996, Hull's sentence was cut short and Hull was released from the RHU into the general prison population, where Hull continued to experience physical symptoms. Hull visited the prison medical unit for treatment. Prison Doctors McKeon and Grandville gave Hull aspirin and Tylenol and told him to return every two days for two weeks for blood pressure tests. Dr. McKeon ultimately found that Hull's physical condition was normal, and that Hull's ailments were caused by

stress. To help alleviate the stress, Dr. McKeon gave Hull a book on relaxation techniques.

On April 2, 1996, Hull complained to Dotter about his medical treatment and on April 4, 1996, Hull wrote to Cerullo for permission to see an outside physician. (Defend Exhib. 3, A.) Cerullo denied Hull's initial request and an identical later request (Defend Exhib. 3, B), and advised Hull that he should follow Dr. McKeon's advice.

Following Hull's release from the RHU, Dotter received a report from Fryzel regarding Hull's complaint. Fryzel stated that he investigated the vent in Hull's cell, that he did not detect any odor, and that Hull's vent could not have been the only vent emitting odors because Hull's vent was linked to all other vents in the unit. Fryzel further stated that Hull's grievance was moot because Hull had already been moved from RHU. Based on Fryzel's report, Dotter took no action and, according to Hull, did not inform Hull of her decision.

On April 19, 1996, proceeding in forma pauperis, Hull filed a 42 U.S.C. § 1983 claim against Dotter, Cerullo, Fryzel, and Dragovich. On May 9, 1996, Hull supplemented his complaint with a statement of claim, in which he detailed defendants' alleged violations of his Eighth Amendment rights. On November 27, 1996, defendants filed the instant motion for summary judgment.

Subsequently, on April 22, 1997, Hull filed a motion for leave to amend his complaint to add Eighth Amendment claims

against the following defendants: Nurse E. Kowaluh, Dr. Brian McKeon, and Dr. B. Singh.

II. DISCUSSION

A. Standard of Review

Upon motion of any party, summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Where, as here, the nonmovant bears the burden of persuasion at trial, the moving party may meet its burden "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

When a court evaluates a motion for summary judgment, "the evidence of the nonmovant is to be believed." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Furthermore, "in reviewing the record, the court must give the nonmoving party the benefit of all reasonable inferences." Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3rd Cir.), cert. denied, 115 S. Ct. 2611 (1995). However, the nonmovant "must present affirmative evidence to defeat a properly supported motion for summary judgment," Anderson v. Liberty Lobby Inc., 477 U.S. at 257, and "the mere existence of a scintilla of evidence in support of the

nonmovant's position will be insufficient." Id. at 252. Indeed, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. Eighth Amendment

Hull alleges two areas in which defendants' actions constituted cruel and unusual punishment in violation of the Eighth Amendment. First, Hull alleges that Cerullo and Dotter denied Hull access to adequate medical treatment for his illness. Second, Hull alleges that Dragovich, Dotter and Fryzel were responsible for keeping Hull incarcerated in a prison cell in which deficient ventilation caused Hull serious health problems. The court will first address Hull's medical treatment claim before addressing Hull's conditions of confinement claim.

i. Provision of Medical Care

In Estelle v. Gamble, 429 U.S. 97, 102-03 (1976), the Supreme Court held that the Eighth Amendment imposes an obligation on the government "to provide medical care for those whom it is punishing by incarceration." This duty is in accordance with the "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'" embodied in the Eighth Amendment. Id. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). Recognizing that an inmate is

forced to rely on prison authorities to treat his medical needs, the Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." Id. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 182-183 (1976)). This duty applies to prison doctors in their response to prisoners' medical needs, and to prison guards in providing prisoners access to medical personnel. Id. "The standard enunciated in Estelle is two pronged: '[i]t requires deliberate indifference on the part of the prison officials and it requires prisoner's medical needs to be serious.'" Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) (quoting West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978)).

Deliberate indifference to medical needs is manifested where the defendant has knowledge of the prisoner's need for medical care, and intentionally refuses to provide such care. Monmouth, 834 F.2d at 346. "Deliberate indifference is also evident where prison officials erect arbitrary and burdensome procedures that 'result[] in interminable delays and outright denials of medical care to suffering inmates.'" Id. at 347 (quoting Todaro v. Ward, 565 F.2d 48, 53 (2d Cir. 1977)). Finally, deliberate indifference is shown where prison officials prevent an inmate from receiving a recommended treatment or deny an inmate access to a physician capable of accessing the need for treatment. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979).

For the second prong, the prisoners medical "condition must be such that a failure to treat can be expected to lead to substantial and unnecessary suffering, injury or death." Colburn v. Upper Darby Township, 946 F.2d 1017, 1023 (3d Cir. 1991). "Moreover, the condition must be 'one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Id. (quotations omitted).

Not all inadequate medical care claims arise to the level of a constitutional violation. Allegations of malpractice do not raise issues of a constitutional dimension. Estelle, 429 U.S. at 106. "Simple malpractice under a common law negligence standard, without some more culpable state of mind, is not inconsistent with evolving notions of decency merely because it occurs within the four walls of a prison." Sample v. Diecks, 885 F.2d 1099, 1109 (3d Cir. 1989). "Inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" Estelle, 429 U.S. at 105-106. Similarly, a prisoner's mere objection to the medical treatment provided does not support an Eighth Amendment claim, and no claim is stated merely because one doctor disagrees with another doctor's professional judgment. White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990). Further, prison officials cannot be held liable for failing to respond to a prisoner's medical complaints when the prisoner, at the time, was receiving treatment from

prison doctors. Durmer v. O'Carroll, 991 F.2d 64, 69 (3d Cir. 1993).

Here, defendants are entitled to summary judgment on Hull's claim that Cerullo acted with deliberately indifference to his medical needs. When Hull first notified Cerullo of his ailments, he was then receiving treatment from nurse Kowaluh and he had access to prison medical personnel. When Hull later complained about his treatment, he was already receiving care from Doctors Mckeon and Grandville. After his release from the RHU, Hull visited the prison doctors every other day for two weeks for blood pressure tests. Hull's complaint is simply that he is unhappy with the treatment provided by Mckeon and Grandville, especially their diagnosis that his headaches were stress related and their prescribed treatment--relaxation techniques. However, mere disagreement with the type of medical treatment provided does not rise to the level of an Eighth Amendment violation. See White, 897 F.2d at 110. Moreover, Cerullo--who is a health care administrator and not a doctor--cannot be liable under § 1983 for her refusal to permit Hull to consult with an outside physician; Cerullo's refusal to provide Hull with a second (or third) medical opinion does not evince "unnecessary and wanton infliction of pain." See Estelle, 429 U.S. at 104.

Hull's medical care claim against Dotter fails for similar reasons. Hull avers that Dotter was deliberately indifferent to his medical needs in that Hull submitted a

grievance to Dotter on April 2, 1996, which detailed his denial of proper medical treatment, and Dotter took no action. However, when Hull submitted his grievance, prison doctors were then treating Hull's alleged injuries, and Hull supplied Dotter with no information to indicate that his treatment was improper, save for his own disagreement with the doctors' diagnosis and treatment.

ii. Conditions of Confinement

The Eighth Amendment ban on cruel and unusual punishment applies, inter alia, to a prisoner's conditions of confinement that are not formally imposed as a sentence for a crime. Helling v. McKinney, 113 S. Ct. 2475, 2480 (1993). "Prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" Farmer v. Brennan, 114 S. Ct. 1970, 1976 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)).

To sustain an Eighth Amendment conditions of confinement claim, an inmate must establish two elements: objective proof of inadequate conditions of confinement and subjective proof of defendants' culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 297 (1991). For the first element, conditions of confinement may constitute cruel and unusual punishment if they result "in unquestioned and serious deprivations of basic human needs . . . [which] deprive inmates

of the minimal measures of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). "No static 'test' can exist by which courts can determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society." Id. at 346. The Eighth Amendment does not mandate comfortable prison conditions; prisons that house inmates convicted of serious crimes cannot be free of discomfort. Peterkin v. Jeffes, 855 F.2d 1021, 1027 (3d Cir. 1988). As the Supreme Court has stated, "extreme deprivations are required to make out a conditions-of-confinement claim . . . [b]ecause routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.'" Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992) (quoting Rhodes, 452 U.S. at 347). An Eighth Amendment violation occurs only where cell conditions are so inadequate as to be intolerable, shockingly substandard or dangerous. Inmates of Allegany County Jail v. Pierce, 612 F.3d 754, 757 (3d Cir. 1979).

Here, Hull asserts that Dragovich, Dotter and Fryzel violated his Eighth Amendment rights because they acted with deliberate indifference to his confinement in a cell in which the air quality caused Hull to suffer serious medical ailments. Hull alleges that a "toxic odor" entered his cell via a ventilation

duct, and that this odor caused him to experience headaches, stomach cramps, and nasal bleeding.[1]

Courts that have addressed conditions of confinement claims premised on poor air quality have required plaintiffs to establish that the inadequate air quality caused the plaintiff serious existing injury or the likelihood of serious future injury. In Helling v. McKinney, 113 S. Ct. 2475 (1993), the Supreme Court held that an Eighth Amendment claim could be based upon possible future harm to health, as well as present harm, arising from exposure to environmental tobacco smoke (ETS). In discussing the objective factor for determining whether exposure to ETS constituted conditions of confinement in violation of the Eighth Amendment, the Supreme Court stated that courts must do more than simply determine the scientific and statistical evidence of the seriousness of the potential future harm to health caused by ETS. Before concluding that exposure to dangerous levels of ETS constitutes inadequate conditions of confinement, courts must

> assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is

1. The court also finds that Hull has not submitted any evidence from which a rational trier of fact could conclude that the odor in his cell caused his claimed ailments. To establish a causal nexus, Hull would need to produce medical testimony that establishes a connection between Hull's symptoms and the air quality in his cell in the RHU unit.

> not one that today's society chooses to tolerate.

Id. at 2482.

However, Hull does not allege that prison officials were deliberately indifferent to the risk of future harm to his health; rather, Hull alleges that prison officials demonstrated deliberate indifference to conditions that caused existing harm to Hull's health. In Helling, the Court did not indicate what level of severity of existing physical injury is required to satisfy the objective element of a conditions of confinement claim premised on poor air quality.[2]

However, there is a consensus among the circuits that, in order to maintain an Eighth Amendment claim for an existing injury caused by poor air quality, the plaintiff must prove that his injury is so serious as to violate contemporary standards of

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2. At the trial court level, the parties had consented to have a United States magistrate judge conduct the trial and enter a final judgment. McKinney v. Anderson, 924 F.2d 1500, 1503 n.2 (9th Cir. 1991). The magistrate judge had allowed the prisoner to proceed on the issue of whether prison officials were deliberately indifferent to his existing serious medical condition. Id. at 1503. However, after the plaintiff presented his evidence, the magistrate judge granted a directed verdict in favor of the prison officials on the ground that the plaintiff had failed to present any evidence that the officials were deliberately indifferent. Id. The Ninth Circuit affirmed, finding that the there was no evidence in the record that prison officials were deliberately indifferent in that the prison doctor had examined the plaintiff and "found no serious existing ailments requiring treatment." Id. at 1511. On appeal, the Supreme Court did not review the Ninth Circuit's decision to affirm the magistrate judge's verdict in favor of the defendants on the plaintiff's existing medical needs claim, but instead limited its review to the Ninth Circuit's reversal of the magistrate judge's dismissal of the plaintiffs' future medical needs claim. Helling, 113 S. Ct. at 2481.

decency. In Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988), which addressed a challenge by inmates to physical conditions on death row, the Third Circuit affirmed the district court's findings that the lack of significant airflow to the inmates' cells did not violate the constitution. Id. at 1026-27. The prisoners complained that poor heating and ventilation created steambath like conditions in their cells. Further, the prisoners' environmental expert opined that the poor airflow increased the development and spread of infectious respiratory diseases. After an evidentiary hearing, the district court had found that the airflow did not pose a genuine health risk, and had held that the constitution only mandates ventilation necessary to support life and prevent the spread of infectious respiratory diseases, but not ventilation sought to improve comfort levels. See Peterkin, 661 F. Supp. 895, 904-905 (E.D. Pa. 1987). In affirming, the Third Circuit concluded that the conditions as described by the district court were not "dangerous, intolerable or shockingly substandard" as to violate the Eighth Amendment, and noted that "[t]he constitution does not mandate comfortable prisons." Peterkin, 855 F.2d at 1027 (quotations omitted).

Similarly, in Oliver v. Deen, 77 F.3d 156, 161 (7th Cir. 1996), the Seventh Circuit rejected an Eighth Amendment claim brought by an asthmatic inmate who complained that a fellow cellmate's smoking had caused him to wheeze and show other signs of discomfort. The plaintiff submitted evidence that he was

asthmatic, that he had been prescribed medication--Theophylline and a Netatroterenol inhaler--and, that at another prison where the plaintiff had been formerly incarcerated, medical staff had ordered that the plaintiff be celled only with a non-smoking cellmate. Id. at 158. Further, the plaintiff forwarded affidavits of other inmates who testified to their observations that, following his confinement with a heavy smoker, the plaintiff had difficulty breathing, had chest pains, wheezed, and had other common symptoms of an asthma attack. Id. at 159. The court nevertheless concluded that the plaintiff had failed to show that his exposure to tobacco constituted conditions of confinement in violation of the Eighth Amendment because the plaintiff's medical condition was not so serious as to implicate the constitution; the plaintiff's asthma was mild, he had never required outside hospitalization, and he had even missed a few appointments with medical personnel regarding his asthma. Id.

In contrast, in Weaver v. Clarke, 45 F.3d 1253 (8th Cir. 1995), the Eighth Circuit held that prison officials' alleged deliberate indifference to the plaintiff's smoke induced illness violated the Eighth Amendment. In Weaver, the plaintiff had experienced severe headaches, dizziness, nausea, vomiting, and breathing difficulties when roomed with a smoking cellmate. Id. at 1254. The prison officials argued that they had qualified immunity because the alleged violations occurred four to seven months before the Supreme Court decided Helling and, therefore, the right to be free from future health risks posed by ETS was

not a clearly established right at the time of injury. Id. at 1256. However, the court noted that the plaintiff had alleged deliberate indifference to existing ill health and not future health risks, and the court concluded that qualified immunity did not apply because the plaintiff had alleged serious medical needs, and because a claim of deliberate indifference to existing serious medical needs had been first recognized by the Supreme Court over two decades before in Estelle v. Gamble, 429 U.S. 97 (1976). Id. See also Sanders v. Brundage, 60 F.3d 484 (8th Cir. 1995) (holding that court lacks jurisdiction over appeal of district court denial of summary judgment to prison officials on claim that officials' rooming of asthmatic inmate with smoking cellmate contrary to doctor's orders violated Eighth Amendment).

Here, the court holds that Hull has failed to satisfy the objective element of an Eighth Amendment conditions of confinement claim because Hull has proffered no evidence that he suffered a serious harm. The injuries alleged by Hull were minor ailments, the combination of which cannot be said to constitute a deprivation "of the minimal measures of life's necessities" in violation of the Eighth Amendment, Rhodes, 452 U.S. at 347, or an "unquestioned and serious deprivation of human needs." Id. at 347. There is no evidence that the ventilation in Hull's cell was inadequate to support life or prevent the development or spread of infectious respiratory diseases. At most, the conditions in Hull's cell were uncomfortable. Further, Hull has presented no evidence to support his assertion that he suffered

illness as a result of his incarceration in the RHU. Hull was examined many times by prison doctors, who found no serious ailments requiring any treatment other than aspirin. Consequently, defendants are entitled to summary judgment on Hull's claim because Hull has failed to presented evidence that his conditions of confinement were objectively deficient.

The second element of a conditions of confinement claim requires proof that defendants had a culpable state of mind; plaintiff must show that defendants were deliberately indifferent to his health and safety. Farmer, 114 S. Ct. at 1977. The standard is subjective; the defendant must have been aware of the facts from which the inference could have been drawn that a substantial risk of serious harm existed, and the defendant must have made the inference. Id. at 1979. Whether the defendants had the required knowledge is an issue of fact for the jury. Id. at 1981. Plaintiff may prove knowledge through circumstantial evidence showing that the risk was so obvious that defendants must have known. Id. A defendant "[w]ould not escape liability if evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." Id. at 1982 n.8. However, a defendant is not liable if he or she made reasonable efforts to remedy adverse conditions, even if such efforts failed. Id. at 1983.

Here Hull has failed to come forward with evidence that Dragovich and Dotter acted with deliberately indifference to his

plight. With respect to claims against Dragovich, there is no evidence that Dragovich acted with deliberate indifference to Hull's complaint regarding odors in his cell. Hull states that he notified Dragovich of the odors on March 14, 1996, and Dragovich took no action. However, Hull was released from the RHU the following day on March 15, 1996. Consequently, Dragovich had no opportunity to respond to Hull's complaint and, therefore, no rational trier of fact could conclude that Dragovich acted with deliberately indifference to Hull's health or safety.

Regarding Hull's claim against Dotter, the record reveals that Hull submitted an official inmate grievance to Dotter on March 12, 1996, three days prior to his release from the RHU. Dotter acknowledged receipt of the grievance on March 13, 1996. (Defend. Exhib. 2. A.)

Policy Statement No. 804, entitled Consolidated Inmate Grievance Review System (Policy), sets forth the applicable procedure for inmate grievances. An inmate must submit all grievances to the Facility/Regional Grievance Coordinator, and all grievances must be in writing on a format provided on the forms supplied by the institution. (Policy at VI(A)(1).) The grievance is forwarded to the appropriate Grievance officer for investigation and resolution. (Policy at VI(B)(3).) The grievance officer is required to interview the grievant and any other persons with personal knowledge of the subject matter and, within ten working days of receipt of the grievance by the grievance officer, the grievance officer must provide the

grievant with a written response stating a summary of the conclusions, a brief rationale, and any action taken to resolve the issues. (Policy at VI(B)(4).)

Dotter referred Hull's grievance to Fryzel, who reported back that he had checked the vents and detected no odor. Fryzel also informed Dotter that Hull was no longer in the RHU in that he had been released into the general prison population on March 14, 1996. (Defend. Exhib. A.) Fryzel's report is dated March 13, 1996, which is an error because Fryzel discusses in the report events that occurred after March 13.[3] Nonetheless, ~~the court finds that~~ Dotter received the initial review of Hull's grievance after Hull had been released from the RHU. Additionally, Hull was released from the RHU within 10 days of Dotter's receipt of Hull's grievance and, therefore, the conditions cited in Hull's grievance terminated within the time period set by the grievance policy for Dotter or her subordinate to respond. Consequently, Dotter cannot have been deliberately indifferent to Hull's conditions of confinement because the alleged conditions ended prior to when Dotter became responsible for Hull's grievance.

In contrast, questions of fact exist regarding whether Fryzel acted with deliberate indifference to Hull's complaint. Hull submitted a written request for a cell move to Fryzel on March 11, 1996, four days before Hull's release from the RHU.

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3. It is likely that the date of the investigation report was confused with the grievance date.

Fryzel contends that he did not move Hull to another cell because no other cell was available. Whether or not an empty cell was available raises a genuine issue of fact for trial, thus precluding the court from granting summary judgment in favor of Fryzel on the subjective element of Hull's conditions of confinement claim.

Further, issues of fact exist as to whether in fact there were any unpleasant odors in Hull's cell. Hull testifies that an odor came into his cell via the ventilation duct. Hull also testifies that Captain Biggs witnessed that the cell was cloudy, although Hull has not submitted testimony from Biggs to that effect. In contrast, defendants submit an affidavit by Fryzel in which he testifies that he checked the air vents but could detect no odor. (Defend. Exhib. 2.) Fryzel also states that the air units and vents in the RHU are centrally linked, and that one vent will not expel an odor without the other vents doing the same. (Defend. Exhib. 2.). Because this conflicting evidence raises issues of credibility, the question of whether or not an odor permeated Hull's cell cannot be resolved at this stage of the proceedings. However, because the court has already concluded that Hull's alleged injuries were not objectively sufficiently serious to constitute an Eighth Amendment violation, the court will nevertheless grant defendants summary judgment on Hull's claims against Fryzel.

C. Motion To Amend

Hull seeks leave to amend his complaint to add claims against Nurse Kowaluh, Dr. McKeon, and Dr. Singh. Hull alleges that on March 9, 1996, Nurse Kowaluh repeatedly ignored his pleas for medical assistance, and refused to refer Hull to other medical staff for further consultation. Plaintiff also avers that on March 10, 11, and 12, 1996, Dr. Singh was deliberately indifferent to Hull's medical needs; Hull informed Dr. Singh of his condition and Singh provided Hull with aspirin. Similarly, Hull claims that on March 12, April 2, 4, and 11, 1996, Hull placed Dr. McKeon on notice of his serious medical condition and Mckeon showed an utter lack of concern for Hull's wellbeing--McKeon told Hull that his headaches were stress related, and told Hull to read of book on relaxation techniques.[4]

Rule 15(a) provides that leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The purpose of Rule 15(a) is to allow liberal amendment of a complaint because "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman v. Davis, 371 U.S. 178, 182 (1962). In exercising its discretion, a district court should grant leave to amend unless sufficient cause exists to deny such leave, based on the following grounds: (1) undue delay, bad faith or dilatory motive on the part of the movant; (2) repeated failure to cure

4. With respect to the original defendants, Hull's amended complaint restates the same facts and legal claims.

deficiencies; (3) undue prejudice to the opposing party; and (4) futility of amendment. Id. "Amendment of the complaint is futile if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss." Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988).

The court will deny Hull leave to amend his complaint because Hull's additional claims would not survive a motion to dismiss. To state an Eighth Amendment claim against prison medical personnel, Hull must allege that defendants intentionally inflicted pain on the prisoner or were deliberately indifferent to the prisoner's medical needs. White, 897 F.2d at 109. Allegations of malpractice do not raise issues of a constitutional dimension. Estelle, 429 U.S. at 106. A prisoner's disagreement with a doctor's professional judgment does not state a violation of the Eighth Amendment. White, 897 F.2d at 110. Hull's new allegations fail to state a claim for relief because the amended complaint merely alleges that Kowaluh, Singh and McKeon were negligent in diagnosing and treating Hull's ailments.[5]

III. CONCLUSION

5. In addition, Hull unduly delayed before filing his motion for leave to amend. The facts underlying Hull's new claims were known to Hull when he filed his initial complaint, and Hull has offered no explanation for the delay. Further, Hull filed his motion for leave to amend after defendants had filed their motion for summary judgment.

The claims alleged by Hull do not constitute objectively serious deprivations of basic human needs in violation of the Eighth Amendment prohibition of cruel and unusual punishment. Consequently, defendants will be granted summary judgment. In addition, Hull's motion for leave to amend the complaint will be denied because Hull's new allegations fail to state claims for relief.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD R. HULL Plaintiff	:	CIVIL ACTION
v.	:	
CAROL DOTTER, MARTIN DRAGOVICH, MARVA CERULLO, and JEROME FRYZEL Defendants	:	NO. 96-3087

ORDER

AND NOW, THIS DAY OF June, 1997, upon consideration of defendants' motion for summary judgment and plaintiff's motion for leave to amend the complaint, and the parties' responses thereto, **IT IS ORDERED** that defendants' summary judgment motion is **GRANTED**, plaintiff's motion for leave to amend is **DENIED**, and judgment is entered in favor of defendants Carol Dotter, Martin Dragovich, Marva Cerullo and Jerome Fryzel, and against plaintiff.

BY THE COURT:

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William H. Yohn, Jr., Judge